SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1343

THOMAS WILKINSON, Petitioner

vs.

STATE OF OHIO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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A writ of certiorari should not issue to review the judgment of the Supreme Court of the State of Ohio entered in the above case on February 5th, 1969.

STATEMENT OF THE CASE

On March 12, 1966, an affidavit was filed in the Hillsboro, Ohio Municipal Court against the petitioner and two other defendants charging them with larceny by trick. The petitioner was indicted by the Grand Jury of Highland County along with the other two defendants. The indictment contained six counts of which the first three were tried in the trial court in the instant case.

On August 9th, 1966, the Court by journal entry, which entry was approved by petitioner's counsel, set the trial date of November 21, 1966 upon the first three counts of the indictment. The petitioner filed for a bill of particulars on October 27, 1966. The Court sustained the motion in several respects on November 16, 1966 and a bill of particulars was filed in compliance therewith on November 18, 1966, and on the same day petitioner's counsel was served a copy of the bill.

On the 21st day of November, the first day of trial,

petitioner's counsel appeared in court for something more than the purpose of observing the trial of the other two defendants. On that morning, counsel for petitioner filed a written motion for a continuance alleging several grounds. (See Appendix A.) There was no allegation alleging failure of notice of the trial date in the motion. This same morning of November 21st, 1966, the Clerk of Courts made a statement to counsel for petitioner concerning the matter of petitioner being on trial that day. Petitioner's counsel then orally raised this as a grounds for a continuance.

The trial judge thoroughly explored the various written grounds for a continuance and went so far as to send petitioner to a physician to ascertain if he were physically able to stand trial. The trial judge thoroughly examined the merits of the oral grounds for a continuance (lack of notice) and overruled petitioner's motion.

Throughout the trial, petitioner's counsel participated in the trial by way of interposing objections and acted very effectively in conjunction with the two other attorneys representing the other two defendants, as indicated by the record.

There were several police officers present in the court room in uniform because of witness intimidation and threats as reflected in the record of evidence at Page 53.

> "We got one female witness who has been beat up already. We have another male witness who was beat up and at the time of being beat up, one of the honorable defendants also made the statement that, 'Aren't you Charlie so and so?' and he said, 'No, I am his brother.' 'Oh,' he said, 'We made a mistake.' Then there have been numerous threats on the main witness in this case and furthermore, one (defendant) said they would come down here and blow this damn town off the map."

At the trial, counsel for the petitioner interposed an objection concerning the number of uniformed officers (R. 52), and the number of officers in uniform was reduced to three.

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I. WHERE COUNSEL FOR PETITIONER IS NOTIFIED BY ENTRY WHICH HE APPROVED AND WHICH ENTRY WAS JOURNALIZED BY THE TRIAL COURT SETTING THE CAUSE FOR TRIAL, AND ON THE MORNING OF TRIAL, THE CLERK OF COURT MAKES A STATEMENT TO COUNSEL WHICH INDICATES THAT PETITIONER WILL NOT GO ON TRIAL THAT MORNING, HAS PETITIONER BEEN DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE TRIAL COURT FAILED TO SUSTAIN HIS MOTION FOR A CONTINUANCE?

Counsel for petitioner presented himself on the morning of the trial and filed a written motion for continuance which alleged several grounds, none of which was the allegation that he received no notice of trial. As an additional oral ground for a continuance, counsel for petitioner stated he was not prepared to go to trial because of the statement of the Clerk of Courts that petitioner would not be tried. This statement was made one-half hour before trial time (R. 16) and in no way could have interfered with petitioner's preparation of his defense. Counsel for petitioner knew that the first three counts of the indictment would be tried on that day. He had prepared one entry to that effect with his approval endorsed thereon and had three or four conversations with the Court concerning this matter. Further, the decision

on petitioner's motion for a bill of particulars was filed November 16, 1966, and counsel for petitioner was ordered to prepare the entry. This decision related to the first three counts for which petitioner was to be tried. If counsel for petitioner did not believe petitioner was to be tried on November 21st, 1966, why did he appear that day and file a motion for a continuance?

As reflected in the record, counsel for petitioner did participate in the trial.

II. WAS THE PETITIONER DENIED DUE PROCESS OF LAW WHEN HE DID NOT SEASONABLY REQUEST A BILL OF PARTICULARS?

Ohio Revised Code Section 2941.07 provides for a bill of particulars as follows:

> "* * * The Prosecuting Attorney, if seasonably requested by the defendant, or upon order of the Court, shall furnish a bill of particulars setting up specifically the nature of the offense charged."

Petitioner waited until twenty-five days before trial to file the motion for a bill of particulars. On November 16th the Court ruled upon the motion and on November 18th, the bill of particulars was filed and on the same day a copy of the bill was served on petitioner's counsel. The purpose of a bill of particulars is not to disclose the state's evidence but simply to state specifically the nature of the offense charged. **State of Ohio** vs. **DeRighter,** 145 Ohio St. 552.

The Supreme Court of Ohio held in this case before the Court that petitioner did not seasonably request a bill of particulars.

III. HAS THE PETITIONER BEEN DENIED A FAIR AND IMPARTIAL TRIAL WHEN THIRTEEN UNIFORMED POLICE OFFICERS WERE PRESENT IN THE COURT ROOM AND NEWSPAPER

ARTICLES RELATING TO THE TRIAL WERE PUBLISHED OUTSIDE THE COMMUNITY WHERE THE TRIAL TOOK PLACE?

As set forth in the statement of facts, there was reason for the police officers to be present in the court room. Upon the objection of counsel for petitioner and prior to completion of the voir dire of the jury, the number of uniformed police officers was reduced to three.

The newspapers referred to as reflecting adversely to petitioner were out of town newspapers located in Dayton, Ohio, a city approximately fifty-five miles from the site of the trial. The record of the trial does not indicate that any of the impaneled jurors had any prejudice resulting from adverse publicity against petitioner and there was no motion made by petitioner for a change of venue.

Petitioner had a fair and impartial trial and was not denied effective assistance of counsel nor due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN O. CROUSE
Counsel for Respondent

APPENDIX A

Highland County } ss.
State of Ohio }

COURT OF COMMON PLEAS
No. 5092

THE STATE OF OHIO, Plaintiff

vs.

THOMAS WILKINSON ET AL, Defendants

MOTION

Now comes the defendant, Thomas Wilkinson and moves the Court for an order continuing the trial of this case insofar as it pertains to this defendant, for the following reasons, to-wit:

1. That on or about the 26th day of October, 1966 this defendant made a motion and demand for a Bill of Particulars herein as is provided by Section 2941.07 of the Revised Code of Ohio, but no order was made thereon until November 16, 1966 and no Bill of Particulars was filed or furnished until November 1966 a copy thereof having been furnished the attorney for the defendant on November 18, 1966 at 4:15 o'clock P. M. as he was leaving his office.

2. That no Bill of Particulars have been furnished as ordered by this Court and the purported bill of particulars filed herein on November 18, 1966 does not comply with the order of this Court made on November 16, 1966.

3. Due to the lack of a Bill of Particulars this defendant has not had sufficient time to properly prepare his defense herein.

4. The ends of justice requires such a continuance.

5. Not knowing the facts that would be divulged by a

proper bill of particulars this defendant did not know what witnesses would be required nor have any witnesses been subpoened for the defense.

6. In the event an Alibi would be used the defendant does not have time to give notice as is required in Section 2945.58 of the Revised Code of Ohio.

7. That due to physical disability this defendant cannot proceed with trial.

Respectfully submitted,

Attorneys for Defendant
Thomas Wilkinson

MEMORANDUM

Section 2945.02 of the Revised Code of Ohio.

APPENDIX B

Ohio Revised Code Section 2945.02. Setting and continuing cases.

The court of common pleas shall set all criminal cases for trial for a day not later than thirty days after the date of enry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

No continuance shall be granted for any other time than it is affirmatively proved the ends of justice require.

Whenever any continuance is granted, the court shall enter on the journal the reason for the same.

Criminal cases shall be given precedence over civil matters and proceedings. The failure of the court to set such criminal cases for trial, as required by this section, does not operate as an acquittal, but upon notice of such failure or upon motion of the prosecuting attorney or a defendant, such case shall forthwith be set for trial within a reasonable time, not exceeding thirty days thereafter.

CERTIFICATE OF SERVICE

I, John O. Crouse, Prosecuting Attorney for the State of Ohio, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1969, I served copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari on parties thereto as follows:

George E. Tyack, Eight East Broad Street, Columbus, Ohio 43215, by certified mail, postage prepaid, return receipt requested.

John O. Crouse
Counsel for Respondent